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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.----------

In The

Supreme Court of the United States

DOMINICK THERESA,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondents,

Petition for a Writ of Certiorari to the
New Jersey Court of Appeal,
Appellate Division

Petition for a Writ of Certiorari

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January 15, 2001

19pp

QUESTION PRESENTED

This Court should issue this Petition for a Writ of Certiorari to review the Trial Courts and the New Jersey Appellate Division's two separate appeals addressed in one Per Curiam opinion. The Petitioner, presents substantial questions of the general public importance of equal protection, fairest and Due Process which rises that under the **U.S. Constitution of the Sixth and Fourteenth Amendments**, **the Petitioner was denied this Due Process to a Fair Hearing in presenting witnesses, the motion's and any of the Newly Discovered Exculpatory Evidence to the Trial Court.** The transcripts from the Trial Court, clearly shows that the Petitioner, spoke only (9 words) "Your Honor, Dominick Theresa I'm presenting myself, the Defendant."(11/5/98 T. page 13, line 2 to 10) and immediately the Trial Court stated that the motion is dismissed and moot, 3 separate times.

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In The

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No.----------

DOMINICK THERESA,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent,

Petition for a Writ of Certiorari to the
New Jersey Court of Appeal,
Appellate Division

Petition for a Writ of Certiorari

The Petitioner, Dominick Theresa prays that the Court issue a Writ of Certiorari to review the judgment of the Court of Appeal for the State of New Jersey, Appellate Division and the Trial Court.

OPINIONS BELOW

The two denied motions of 10/5/1998 and 2/4/1999 from the Superior Court of the state of New Jersey Chancery Division for the county of Somerset is set forth at page (5a and 6a) of the Appendix.

The Per Curiam Opinion of the Court of Appeal of New Jersey, Appellate Division (Appendix 1a - 4a).

New Jersey Supreme Court denied the Petition for Certification, on October 19, 2000. (Appendix 7a).

JURISDICTION

New Jersey Supreme Court denied the Petition for certification on October 19, 2000. (Appendix 7a)

This Court has Jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTES INVOLVED

Fourteenth Amendment: No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the U.S.: nor shall any state deprive any person of life, Liberty or property, without due process of law: nor deny any person without its jurisdiction the equal protection of the law.

N.J.R.E. 404(b): Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

Rule 3:21-10(d) comments 4 (d): Consideration during appeal, was effective September, 1981 the Trial Court may hear and reconsider a sentence pursuant to this rule during the pendency of any appeal in the appellate division, having jurisdiction pending appeal to either modify a sentence or even to correct an legal sentence.

Sixth Amendment: The right to conduct his or her own defense as necessary to a fair trial under the Due Process clause and to have compulsory process for up obtaining witnesses and his favor.

N.J.S.A. 2C: 29-9 (b)Contempt: A person is guilty of a crime of the fourth degree if that person purposely or knowingly violates any provision in an order. All orders need to be served, dated and validated upon a person, N.J.S.A. 2C: 25-21 (A) 3 before any one can be in Contempt of any order.

STATATEMENT OF THE CASE

A. Facts

This Certiorari, is addressing (2) appeals in one Per Curiam Opinion [1a to 4a] from the Appellate Division, arises from (2) of the Defendants/Petitioner motions to the Trial Court both denied on 11/5/98 [5a] and 2/4/99 [6a] from an alleged Contempt N.J.S.A. 2C: 29-9 (b) Conviction on July 24,1997 for allegedly violating an April 17,1997 Sue Sponte, no date of service, Amended Temporary Restraining Order which that order, and all others orders, where dismissed on June 4,1998. The Contempt Conviction was pending in the Appellate Division when the (2) motions moved before the Trial Court. Notification was sent to the Appellate Division about each Motion. In these (2) Appeals, the Petitioner argued that the Trial Court erred in dismissing both motions as the defendants Sixth and Fourteenth Amendment of Due Process Rights, was violated to a fair hearing in presenting both proffer, prima facie witnesses to testify and the exculpatory evidence to the Trial Court.

The witnesses and the Newly Discovered Exculpatory Evidence had all the merits to have mooted the pending Contempt Conviction Appeal. But the Petitioner Fourteenth Amendment was violated. Moreover, the general public importance is also the wasted major Court time and wasted Respondent /Prosecutorial time and resources over a unmeritorious trivial matter [this alleged Contempt chance-meeting] non-actionable event State v. Krupinski, A-2077-9772 [App. Div. 1999] as defined by State v. Wilmouth, 302 N.J. Super 20 [App Div. 1997] all over the Petitioner not receiving full Due Process rights with the Trial Courts.

The Trial Court also erred in denied the Petitioner the Fourteenth Amendment to Due Process and a fair hearing to present the witnesses and evidence by not having jurisdiction to hear the motion, which in fact under Rule 3:21-10 (d) comments 4 (d) the Trial Court had full continuous Jurisdiction to hear the motion as well as the witnesses can testify under N.J.R.E. 404(b).

This Certiorari, to this Court is needed to settle this matter and in which the U. S. Constitution Sixth and Fourteenth Amendments, Protects the petitioner and the general public from this kind of injustice.

B. Proceeding below

The Petitioner/Defendant Sixth and Fourteenth Amendment of Due Process to a fair hearing was denied by the Trial Court, which also constituted the capacity to be prejudiced to the Petitioner on 11/5/98 and 2/4/99. Moreover, on 11/5/98 the Trial Court erred and stated: "Procedurally is to ask the Appellate Division to remand the case to the Trial Court. But, by the way, don't bother doing that". "I would deny that motion" (11/5/98 T. page 13 lines 2 to 10). Reviewing the record it clearly shows that the Trial Court denied the motion as moot (3 times), which shows prejudice before anything else was ever said, and the only words spoken by the Defendant was (9 words) "your honor, Dominick Theresa I'm representing myself, the Defendant". The Trial Court clearly failed to explore all of the possible ramifications of allowing the Defendant the Fourteenth Amendment rights of Due Process to present the full motion's, before denying the motions and/or moot the motion's.

The Trial Court also erred with the 11/5/98 Motion as the Trial Court clearly had full Jurisdiction under Rule 3:21-10[d] comments 4[d] to hear the Defendants motion and should have given the Defendant Due Process to a fair hearing in presenting all of the Newly Discovered Exculpatory Evidence and specially the witnesses. In fairness the Court should undo the injustice State v. Croland , 54 N.J. Super. 594 (App. Div. 1959) and reverse the conviction on no criminal intent Noble v. State, 248 Ind. 17,238 N.E. (2d) 651 (1968).

REASONS FOR GRANTING THE WRIT

I. The Petitioner under the United States Constitution of the Sixth and Fourteenth Amendment clearly did not receive Due Process to a fair hearing in presenting Witnesses and Newly Discovered Exculpatory Evidence.

This matter clearly presents a question of general public importance. The Petitioner and the general public are all required under the **U.S. Constitution of the Sixth and Fourteenth Amendments** to have Due Process rights to a fair hearing and to present its case, motion, evidences, defense and witnesses.

The Petitioner did not receive the Due Process Rights to a fair hearing to present it case and specially to present its witnesses in the Trial Court.

The Appellate Division unjust results are addressing irrelevant issues, misrepresented statements, impressions unwarranted and determining statements in the opinion of the witness Mona Theresa, without Mona testifying, clearly the Court is manifesting injustice.

The Trial Court and/or the Appellate Division opinion had no authority to impose what the witness, Mona Theresa testimony would be, clearly the Petitioner was denied Due Process to Present, its witness during the motion. Moreover, equal justice of the law, the witness should and can testify **N.J.R.E.** 404(b) State v. Nance, 148 N.J. 376 (App. Div.1997). The affidavit and proffer of the witness Mona Theresa was not a Newly Changed position, but was Newly Discovered Evidence.

The Trial Court denied and mootness ruling, clearly doesn't indicate for the petitioner to continue on with the motion, specially when the motion is denied and moot. If the Trial Court does work like this from Appellate Division opinion, clearly these are signs of unfairness of Due Process.

The Petitioner should clearly have his fair day in Court and not be treated as though, we have "no" Sixth or Fourteenth Amendments of the United States Constitution of Due Process to a fair hearing. This Certiorari should be granted.

II. The Trial Court clearly had full jurisdiction to hear the motion under Rule 3: 21-10 (d) comments 4 paragraph (d) but the Trial Court denied the Petitioner the Fourteenth Amendment of Due Process to a fair hearing.

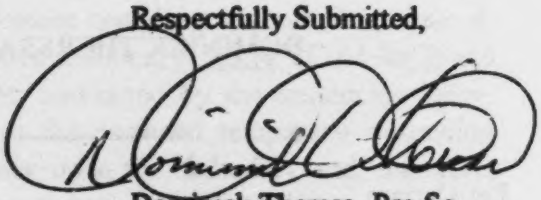
The Appellate Division stated that the Trial Court had no Jurisdiction to hear the Petitioner motion when the Contempt Appeal was pending, which in fact the Trial Court clearly had full Jurisdiction under **Rule 3:21-10[d] comments 4 paragraph [d]** to hear the Petitioner's motion and should have given the **Fourteenth Amendments** of Due Process to a fair hearing to the Petitioner, in presenting all of the Newly Exculpatory Evidence and the witnesses.

This Petition presents Substantial Questions of the general public importance for equal justice under the **U.S. Constitutional Laws and Amendments.** This Court should reverse the opinion of the Appellate Division as the Trial Court clearly erred. A new Trial and new Judge was required, without allowing the Defendant / Petitioner Due Process to present its Newly Discovered Exculpatory Evidence and to present its witnesses, Shater v. Westmount Village Apts, 27-2-5363 [App. Div. 1998].

CONCLUSION

This Court should issue a Petition for a Writ of Certiorari to the Petitioner and review the Appellant Division opinion and the Trial Court denied motions. The above merits clearly show that under the United States Constitution of the Sixth and Fourteenth Amendment the Petitioner clearly, did not receive Due Process to a fair hearing in presenting Witnesses and Newly Discovered Exculpatory Evidence.

Respectfully Submitted,



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Appendix A

[filed: June 6, 2000]

SUPERIOR COURT
OF NEW JERSEY APPELLATE DIVISION

Docket No. A-3757-98T2 and A-4423-98T2
(Somerset County Super. Ct. Docket No. F0-18-000331-97)

STATE OF NEW JERSEY,
Plaintiff and Respondent,

v.

DOMINICK THERESA,
Defendant and Appellant,

Per Curiam

These two appeals, which we are addressing and one decision, arise from defendant Dominick Theresa's July 24th, 1997 contempt conviction for violating and April 17, 1997 amended temporary restraining order, N.J.S.A. 2C:29-9b. In these appeals defendant argues for various reasons that we should dismiss the contempt conviction in or mitigate some of its consequences. We reject defendant's argument and affirm.

Defendant and his wife Mona Theresa (" Mona") divorced in 1996, and his contempt prosecution occurred in 1997. We need not to repeat the details of defendant's contempt violation because they were set forth in our November 24th, 1998 per curiam unreported decision. State v. Theresa, No. A-670-97 (App.Div.Nov.24, 1998). Upon conviction for contempt, Judge Ashrafi sentence defendant to 18 months probation. As a condition of probation, defendant had to serve ten days in the Somerset County jail as well as undergo a mental health examination and treatment as needed. In addition the

Judge required defendant to pay among other required penalties, a $20 monthly probation supervision fee. He was further ordered to have no contact with his former wife. On November 24, 1998, we affirmed defendant's conviction and sentence. Ibid. The Supreme Court denied the defendant's petition for certification on May 26, 1999. State v. Theresa, 160 and N.J. 477 (1999).

While defendant's contempt conviction appeal was pending in the Appellate Division, defendant moved on October 5, 1998 before judge Ashrafi to dismiss the original contempt charge because of new "exculpatory evidence." The claimed exculpatory evidence constituted Mona's affidavit attesting that "the defendant, Dominick Theresa did not act purposefully and knowingly during a chance meeting on April 19, 1997 to be in contempt of the amended temporary restraining order." Defendant also argued that because Mona had the domestic violence complaint dismissed on June 4, 1998, aggravating factors three and nine, N.J.S.A. 2C:44-1a(3) and (9), a should not have been considered by the sentencing judge. Defendant also claimed that the amended temporary restraining order did not indicate service upon the defendant and, therefore, should he not have been convicted of violating that order. Judge Ashrafi ruled that because defendant had appealed his conviction to the Appellate Division, the trial court lacked jurisdiction, and consequently Judge Ashrafi denied defendant's motion. This denied resulted in defendant's first appeal.

In December 1998, after receiving our decision affirming his contempt conviction, defendant moved before Judge Ashrafi for early termination of probation and retroactive vacation, to June 4, 1998, of the probation supervisory fee. Defendant argues that during the Feb. 4, 1999 hearing of this motion, Judge Ashrafi "erred by not allowing the defendant to say a word and to present the motion which constitutes the violation of the defendant ['s] Due Process Rights." Consequently, upon denial of this motion, defendant filed his second appeal.

I.

With regard to defendant's first appeal, Judge Ashrafi correctly determined that he lacked jurisdiction. Once a notice of appeal is

filed, Trial Court is deprived of jurisdiction regarding motions and substantial issues concerning the case on appeal. R. 2:9-1. Moreover, even if Mona testified has per her affidavit, her evidence would have been inadmissible. Mona is not competent to testify concerning defendant's state of mind when he confronted her in the Bridgewater Mall. N.J.R.E. 602. Moreover, Mona's changed position cannot possibly be considered "newly discovered."

Defendant also claims that his conviction should be overturned because the amended temporary restraining order did not note that service on defendant had been accomplished. However, when he confronted Mona in the mall, he had to know that the original temporary restraining order prohibited such contact. Accordingly, this technical argument is meritless.

II.

What regard to defendant's second appeal, Judge Ashrafi heard defendant's motion for early probation termination after defendant had already been discharged from probation. Judge Ashrafi properly denied this portion of defendant's motion as moot.

The record also reflects that Judge Ashrafi gave defendant an opportunity to present and argument on this issue, though the Judge clearly indicated that he believed the motion was moot.

> The Court: Okay. You motion is moot, Mr. Theresa , so there's no reason for me to deal with it today. Your probation period is already finished, so there's nothing to terminate early. Isn't that right?
> Mr. Theresa : I don't think so, your honor.
> The Court: Why not?
> Mr. Theresa: It's been filed before probation was up.
> The Court: Your motion is moot. Its denied as moot.

Defendant in the same motion also requested retroactive vacation of his $20 monthly probation supervision fee because he had reconciled with his wife, and she had the underlying restraining order dismissed on June 4, 1998. The record does not clearly indicate that the judge precluded defendant from arguing this issue. After making its mootness ruling, the court then asked whether there was "anything else? "Defendant inexplicably, instead of

indicating that he had an additional argument said, "[a]m I done, your honor?" The court replied "[y]es, you are." We do not read this exchange as clearly indicating that the judge intentionally precluded argument on the supervision fee request. In any event, defendant's request is meritless.

Defendant was properly placed on probation for the contempt conviction. The June 4, 1998 subsequent dismissal of the restraining order does not somehow invalidate defendant's July 24, 1997 lawful contempt conviction for violating that restraining order. State v. Roberts, 212 to N.J. Super. 476, 485-86 (App. Div. 1986). The trial judges refusal to retroactively vacate that fee was completely proper.

Similarly, Mona's affidavit and the dismissal of the restraining order do not retroactively render inappropriate Judge Ashrafi's utilization aggravating factors three and nine in sentencing defendant. The factors were warranted then and will not be retroactively vacated.

III.

Ample literature on domestic violence notes that frequent reconciliations defendant was to be expected in the normal course of many domestically violent relationships. See state vs. Kelly, 97 N.J. 178, 190-97 (1984) (discussing battered-woman's syndrome, particularly the cyclical nature of the syndrome whereby women are abused by their significant other and then either remain in or return to the relationship after pleas for forgiveness and promises to change). See also wilddoner v. Borough of Ramsey, 162 N.J. the 375, 392-93 (2000) (detailing high incidence of unreported domestic violence).

Our prior decision in this case acknowledged that Mona had previously dismissed "numerous restraining order." Given the tenuousness of reconciliation after domestic violence incidents, we categorically reject any requirement making retroactive adjustments to lawfully imposed obligations based exclusively on the fact of reconciliation.

Affirmed.

s/ Emille R.Cox
Clerk of the Appellate Division

Appendix B

[Dated: November 5,1998]

SUPERIOR COURT
OF THE STATE OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
COUNTY OF SOMERSET

Docket No. F0-18-000331-97

STATE OF NEW JERSEY,

Plaintiff,

v.

DOMINICK THERESA,

Defendant,

Notice of Motion, of Newly Discovered Exculpatory Evidence and the proffer Prima facie witness, Mona Theresa testifying. Merits that would moot, the pending Contempt Appeal in the Appellate Division.

Motion dismissed.

s/ The Honorable Victor Ashrafi, J.S.C.
(Somerset County Superior Court)

Appendix C

[Dated: February 4, 1999]

SUPERIOR COURT
OF THE STATE OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
COUNTY OF SOMERSET

Docket No. F0-18-000331-97

STATE OF NEW JERSEY,

Plaintiff,

v.

DOMINICK THERESA,

Defendant,

Notice of Motion, filed on December 23, 1998 for Early Termination of Probation Retroactive from June 4, 1998 and tolling on January 23,1999 with the vacating of the Probation Supervisory fee. This motion is with Newly Discovered Exculpatory Evidence and the proffer witness testifying. The Dismissals of all the Final Order's on June 4, 1998 mooted the probation and sentence of the Aggravating Factors No. 3 and 9. The hypothesis: the building has no foundation in no basement? How can a floor stay! (The floor on June 4, 1998 was knocked out, so probation sentencing, fee and Aggravating Factors No. 3 and 9 became moot instantly, on June 4, 1998). This Motion clearly should be granted, under good Law.

Motion dismissed and moot.

s/ The Honorable Victor Ashrafi, J.S.C.
(Somerset County Superior Court)

Appendix D

[Filed: October 19, 2000]

IN THE SUPREME COURT OF NEW JERSEY

Docket No. 50,048
(App. Div. Docket No. A-3757-98T2 and A- 4423-98T2)

STATE OF NEW JERSEY,

Respondent,

v.

DOMINICK THERESA,

Appellant,

Appellant's Petition for Certification of the judgement in A-3757-98T2 and A- 4423-98T2 is denied.

s/ The Honorable Deborah T. Poritz
Chief Justice